No. 91-1512 (3)

Supreme Court, U.S.
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# In The Supreme Court Of The United States

OCTOBER TERM, 1991

RODNEY D. ROUSH,
*Petitioner,*

v.

JUDITH ANNETTE ROUSH, BETTY WICKLINE, THE STATE OF WEST VIRGINIA Acting Through Its DEPARTMENT OF HUMAN SERVICES, and RHONE-POULENC AG COMPANY, a Pennsylvania corporation,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI


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## I. STATEMENT OF THE CASE

Petitioner, Rodney D. Roush, (hereinafter the "plaintiff") has filed a Petition for Writ of Certiorari (Petition) to review the Fourth Circuit's affirmance of the District Court's dismissal of the plaintiff's complaint. The dismissal was granted based on timely filed Motions to Dismiss. A 12(b)(6), Fed. R. Civ. Proc., Motion to Dismiss is based on the pleadings only. Nevertheless, the plaintiff in his Appellant's Brief to the United States Court of Appeals for the Fourth Circuit and in his Petition to this Honorable Court at pages 4 - 21 includes a number of alleged facts which are not before this Court and were not before the Fourth Circuit below. In its opinion affirming the decision of the Honorable

Charles H. Haden, II, the Fourth Circuit did not consider the miscellaneous alleged facts and inferences raised by the plaintiff, but rather affirmed the dismissal of the complaint based on the complaint itself. Nevertheless, as Rule 15 of the Revised Rules of the Supreme Court of the United States requires, some of the alleged facts objected to by the respondents[1] will be noted below before proceeding to argument on the merits. In addition, as set forth below, Mrs. Roush does not find the dismissal of herself from the lawsuit to be fairly included in any of the questions set forth in the Petition

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[1] The respondents in this case are Judith Roush (hereinafter "Mrs. Roush"); The West Virginia Department of Human Services (hereinafter "DHS"); Betty Wickline, in her official capacity as an employee of the DHS (hereinafter "Wickline"); and Rhone-Poulenc AG Company (hereinafter "RP").

as required by Rule 14 of the Revised Rules of the Supreme Court of the United States and therefore sees no reason for this Court to review the issue of her dismissal from the suit.

On page 4 of the plaintiff's Petition, he begins his "Statement" with the following phrase: "In 1986 only months after encouraging her husband, Rodney Roush ("Plaintiff"), to adopt her son who was born of a previous marriage, Respondent, Judith Roush, ("ex-spouse") initiated a divorce action...." This first allegation is not part of the plaintiff's complaint, is irrelevant and inflammatory in its inference, is incorrect and should not be considered by this Court. Similarly, the plaintiff's comments beginning at the bottom of page 7 and continuing on page 8 regarding his appeal to the

West Virginia Supreme Court on his allegation that his wife was not yet divorced from her prior husband when she married the plaintiff, is not before this Court, is irrelevant, and fails to have mentioned that the appeal was resolved in favor of Mrs. Roush. The West Virginia Supreme Court of Appeals affirmed the opinion of the Circuit Court below.

On pages 8 - 9 of the plaintiff's Statement of Facts, respondents do not dispute the claim that the plaintiff's adopted son lived in North Carolina with his natural father for a while; however, while the plaintiff admits he objected and excepted to the recommendation of the Law Master which included a reduction in the son's support from $150.00 to $50.00, the plaintiff neglects to inform this Court that by

proper Court order the Honorable Herman Canady, Circuit Court of Kanawha County, West Virginia, dismissed the plaintiff's claims that he be relieved of his child support obligations for his adopted son by Order dated August 29, 1990. This is the only Court Order on this subject. As the plaintiff admits on page 6 of his Statement of Facts, recommended orders are "not binding or effective...until reviewed and confirmed by the Circuit Court (W. Va. Code § 48A-4-4)."

On page 10 of the plaintiff's Statement he refers to the Notice to Obligor, which Notice can be found on pages 144-49 of the Appendix to this Court. Such document reflects that the plaintiff, was in arrears $400.00 on his spousal support, not "alimony arrearage." The document itself at para-

graphs 10 and 11 indicates that the plaintiff is to respond in writing. While the plaintiff at page 10 indicates he requested a hearing; nowhere in his complaint or in his Statement does he indicate that he ever followed the requirements as set forth in the notice to him. Further, on page 11 of the plaintiff's Statement is a long recital of what he allegedly stated before Wickline, the paralegal at the DHS, and what happened thereafter. None of the recital of the facts on page 10 - 13 is contained in the plaintiff's complaint. The Affidavit which is attached to the plaintiff's complaint as Exhibit 2 states only that the plaintiff's counsel "recalls the Family Law Master having a conversation with someone at the office of the Department of Human Services; however, he

[the lawyer] does not recall the exact nature of the conversation other than to generally state that it dealt with a mistake regarding the calculation of arrearages in his [Mr. Roush's] case." Affidavit at Para. 4. (App. 151-52).

On page 13 - 14 are several references to a deposition of Wickline, which deposition was not before the United States District Court when it entered its order. The deposition was taken on March 29, 1991, while the Motions to Dismiss were pending. The Order granting the Motion to Dismiss was entered April 18, 1991 and formed no part of Judge Haden's opinion and order.

The plaintiff, beginning at the bottom of page 15 and on page 16 of his Statement, alleges an overpayment of $800.00, but admits that he received due process, in that the DHS reduced

the amount of wage withholding (not "Suggestion" as the plaintiff likes to call it). However, the plaintiff neglects to inform this Court of his admission in his complaint at paragraph 5-D that he still had an arrearage of $80.00. (App. 132-33).

The respondents dispute all claims of alleged overpayment except as stated in the plaintiff's complaint at paragraph 5-F, that in July, 1989, Mrs. Roush had been overpaid an amount of $121.15. (App. 134-35). This information had been provided to her by notice from the DHS which notice included the information that such overpayment would be withheld from future payments to her and the children. The plaintiff neglects to mention that notice or the remedy. On page 17 of the Statement,

the plaintiff attempts to create an inference that Mrs. Roush had received $2,000.00 in overpayments and agreed to such. This is clearly not the case as revealed by the plaintiff's complaint in paragraph 5-F.

Finally, it should be noted that the plaintiff's reference to the Writ of Prohibition filed by Mrs. Roush with the West Virginia Supreme Court of Appeals is not before this Court and has no relevance. Regardless, the plaintiff neglects to inform the Court that Mrs. Roush prevailed.

The respondents preserve their objections to the Statement of the Facts as set forth above and further object to mislabeling wage withholding pursuant to the West Virginia Enforcement of Family Obligations Act (W. Va. Code §48A-1-1, et seq., as a "Suggestion" of

wages. The respondents also object to the inflammatory language used throughout the plaintiff's Petition, such as "star chamber litigation", page 23; "Whereas FLM's are paid primarily by the DHS...through funds churned-up in the cases before them", page 28 and the like. Not only is such argument improper and not based on the pleadings, it is unprofessional.

II. SUMMARY OF ARGUMENT

The DHS and Wickline, in her official capacity as an employee of the Department, were properly dismissed from this action because they are not persons under 42 U.S.C. § 1983. Moreover, W. Va. Code § 48A-5-3 (1986), is constitutional in that it provides an obligor with notice of the withholding, the opportunity to contest the withholding, and notice that certain

exemptions exist under state and federal law. Finally, the plaintiff's § 1983 claims against respondents, Mrs. Roush and RP were properly dismissed as neither Mrs. Roush or RP were acting under color of state law.

## III. ARGUMENT

### A. THE WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES AND BETTY WICKLINE, IN HER OFFICIAL CAPACITY AS AN EMPLOYEE OF THE DEPARTMENT, ARE NOT PERSONS WITHIN THE MEANING OF 42 U.S.C. § 1983 AND, THUS, WERE PROPERLY DISMISSED FROM THIS ACTION.

In Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), this Court held "that a State is not a person within the meaning of § 1983." Id. at 64. Furthermore, this Court also noted that its holding applied not only to states, but "governmental entities that are considered 'arms of the state'." Id. at 70. Finally, this Court con-

cluded that a suit against a state official in his or her official capacity amounts to a suit against the official's office and, as such, is no different from a suit against the State. Id. at 71.

In the case at bar, the plaintiff, pursuant to 42 U.S.C. § 1983, filed this action against the DHS and Wickline, acting in her official capacity as an employee of the DHS.[2] Will dictates that the action against the DHS

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[2] In his Petition, the plaintiff relies upon this Court's recent decision in Hafer v. Melo, 60 U.S.L.W. 4001 (1991), for the proposition that state officials can be sued for monetary damages in § 1983 actions in their personal capacities. The DHS and Wickline are in agreement with this assertion, but point out to the Court that at no time prior to this Petition has the plaintiff ever raised the issue that this action was brought against Wickline in her personal capacity. Therefore, it is inappropriate for the Court to consider the issue at this time.

and Wickline, acting in her official capacity, cannot be maintained and that the decisions of the lower courts in granting and upholding the dismissal of the plaintiff's complaint were appropriate.

B. W. VA. CODE § 48(A)-5-3 (1986) PROVIDES AN OBLIGOR WITH NOTICE THAT HIS WAGES ARE TO BE WITHHELD, THAT HE IS PERMITTED TO CONTEST THE WITHHOLDING AND THAT STATE AND FEDERAL EXEMPTIONS EXIST. THE STATUTE IS THEREFORE CONSTITUTIONAL.

West Virginia Code § 48A-5-3 (1986),[3] authorizes the DHS to pursue and enforce an order of alimony and child support, through the withholding

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[3] Since the plaintiff's filing of this action, the West Virginia Legislature has revised W. Va. Code § 48A-5-3 (1986). For purposes of this Response, however, the respondents refer to the statutory section as it existed at the time the complained of withholding was implemented. This Court should note that the statute set forth in the Appendix is the revised version.

of wages, if the individual required to make such payments is in arrears. The plaintiff asserts that this statute, utilized by the DHS to withhold his wages, is unconstitutional. Although it is not entirely clear from the plaintiff's Petition, it appears that the plaintiff relies upon three factors to support this contention: (1) the statute does not require the DHS to notify the obligor of the maximum amount that can be withheld from his wages; (2) the statute does not require the DHS to notify the obligor of earnings exemptions to which he may be entitled; and (3) the statute does not provide for a notice and a hearing before the obligor's wages are withheld. (Petition at 30-31, 35-36, 44). In so arguing, the plaintiff has either ignored or misapprehended applicable

law, as well as the relevant facts of this case.

In Duranceau v. Wallace, 743 F.2d 709 (9th Cir. 1984), the 9th Circuit addressed an issue virtually identical to that presented in the case at bar, as the plaintiff challenged the constitutionality of the procedures prescribed by Washington law to collect past due child support. The challenged state law empowered the Washington Department of Social and Health Services (Department) to collect child support as the subrogee or assignee of a judgment of the superior court. Id. at 710. To effectuate the collection, the Department was required to serve the debtor with a notice advising him of the amount due and that his property was subject to collection. Id. No sooner that 20 days later, the Depart-

ment could then serve an "order to withhold and deliver" on anyone believed to have property belonging or due to the debtor. Id. at 711. The debtor was also served with a copy of the withholding order. Id. Additionally, the withholding statutes required that the withholding order "state in summary" the wage exemption to which the debtor may be entitled. Id. at 713. Finally, the statutes permitted the debtor to seek judicial relief from the "order to withhold and deliver" on the basis that no support debt is due and owing. Id. at 711. Although not required by statute, the Department encouraged the debtor to discuss any disagreement or defenses with the Department's support officer in charge of the case before seeking judicial review. Id.

The plaintiff first claimed that the Washington withholding statutes violated his right to due process because they did not provide him with a prompt post-garnishment administrative hearing. Id. The plaintiff argued that the current administrative procedure, a meeting with the support officer, was too informal and that the judicial option was too costly and intimidating. Id. at 712. To determine whether the plaintiff's due process rights had been violated by the absence of a formal administrative hearing, the Duranceau Court applied the balancing test enunciated by this Court in Matthews v. Eldridge, 424 U.S. 319 (1976):

> [I]dentification of the specific dictates of due process generally requires consideration of three factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation

> of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved in the fiscal administrative burdens that the additional or substitute procedural requirement would entail.

Duranceau, 743 F.2d at 711 (citing Matthews, 424 U.S. at 335).

After applying the balancing test set forth in Matthews, the circuit court concluded that the Washington withholding statutes did not violate the plaintiff's due process rights. The court explained:

> We have weighed the factors which bear on Duranceau's claim. Because of the strong government interest in the support of children and the expeditious enforcement of judgments, the relatively small risk of erroneous deprivation, and the negligible value of alternative procedures, we find the present procedures do not violate due process.

Duranceau, 743 F.2d at 712. Perhaps of more importance to the case at hand,

the court stated that "[i]t is hard to imagine a more compelling state interest that the support of its children." Id. at 711.

The plaintiff also contended that his due process rights were violated because the Department did not adequately notify him of the earnings exemptions to which he was entitled and all of the available defenses and procedures which could be utilized to challenge the "order to withhold and deliver." Id. at 713. As noted above, the withholding statutes simply required that the Department "state in summary" the wage exemptions. Also, the statutes did not require the Department to notify the plaintiff of all available defenses and procedures to challenge the withholding. Id. Nonetheless, the Court found that the plaintiff was

adequately notified of the garnishment proceedings holding "that Duranceau received adequate notice of the impending seizure, possible defenses, and the manner of asserting those defenses." Id. at 714.

In McCahey v. L.P. Investors, 774 F.2d 543 (2d Cir. 1985), L.P. Investors obtained a valid default judgment against the plaintiff, a single mother of three children, for unpaid rent. Id. at 545. To collect the judgment, L.P. Investors hired a collection agency, which in turn hired an attorney, Allen Rosenthal. Id. Rosenthal ascertained that McCahey had a checking account in Island State Bank and, thereafter, served the bank with a restraining order directing the bank to stop all payments on the account. Id. As required by New York law, Rosenthal

then sent a formal "Notice to Judgment Debtor" to the plaintiff. Id. The Notice disclosed the name of the judgment creditor, informed the plaintiff that her property had been taken and advised the plaintiff that some forms of property were exempt from seizure. Id.

The plaintiff challenged the New York post-judgment attachment statute procedures claiming that they violated her right to due process because: (1) she did not receive notice and a hearing before her property had been seized; (2) a neutral judicial officer did not issue an order allowing the seizure; and (3) the notice did not adequately explain to the judgment debtor the procedure for pursuing an exemption claim. Id. at 549.

The circuit court, however, disagreed with the plaintiff's contentions and affirmed the district court's dismissal of the complaint:

> The district court concluded that post-judgment remedies satisfy due process requirements if they provide: (i) notice to judgment debtors that their property had been seized; (ii) notice to judgment debtors of exemptions to which they may be entitled; and (iii) a prompt opportunity for judgment debtors to challenge the seizure and assert their exemptions. The majority of courts have reached similar conclusions, and we also believe these requirements strike a fair balance between the competing interests.

Id. at 549 (citations omitted).

The McCahey Court adamantly rejected the plaintiff's argument that she was entitled to notice and a hearing before the post-judgment seizure occurred recognizing that "(t)hat level of procedural protection for debtors is not constitutionally required even in the

case of pre-judgment attachments when liability has not been determined." Id. at 550.

Other circuit courts have ruled in a fashion consistent with the Ninth and Second Circuits in evaluating post-garnishment procedures. The courts have recognized that the debtor's right to due process is not violated simply because he did not receive notice and a hearing before attachment and simply because he was not informed of every specific exemption to which he may be entitled. Even the Fourth Circuit which the plaintiff boldly, but erroneously, contends "has ignored any due process rights" in post-judgment garnishment situations, has employed the Matthews, Duranceau and McCahey analysis. See, e.g., Reigh v.

Schleigh, 784 F.2d 1191, 1197 (4th Cir. 1986) ("We are satisfied that a notice which advises the judgment debtor that there are state and federal exemptions that may be available to him, coupled with notice of the right to contest the attachment, meets the requirement of due process"); Dionne v. Bouley, 757 F.2d 1344, 1354 (1st Cir. 1985) ("we think the debtor must be informed of the attachment and of the availability of a prompt procedure to challenge the attachment together with the fact, generally stated, that there are certain exemptions under state and federal law which the debtor may be entitled with respect to the attached property. The state, however, is not required to supply the debtor with a 'laundry list' of statutory exemptions")(citations omitted); Brown v. Liberty Loan Corp.

of Duval, 539 F.2d 1355, 1363 (5th Cir. 1976) ("We hold therefore that due process of law does not require notice and an opportunity for a hearing on entitlement to the exemption before wages are garnished in accordance with Florida law").

The above law, viewed in accordance with the facts of this case, demonstrates that the plaintiff's claims that he was denied due process of law and that W. Va. Code § 48A-5-3 is unconstitutional are totally without merit. First, as Reigh, McCahey, Dionne, Duranceau and Brown establish, due process did not require that the plaintiff receive notice and a hearing before his wages were attached. Thus, the plaintiff's statement that this Court's decision in Matthews v.

Eldridge requires that he be afforded a pre-attachment hearing is a blatant and inexcusable misstatement of the law, especially in light of the fact that the above courts employed the Matthews analysis in arriving at the conclusion that a pre-attachment hearing was not required. Second, the above cases also establish that a debtor, such as the plaintiff, simply be notified that there are state and federal exemptions which may be available to him. Contrary to the plaintiff's assertion, W. Va. Code § 48A-5-3(d)(9) and (10) require that such a notice be given to an obligor, as it states the obligor shall be informed of the following:

> That if the obligor desires to contest the withholding on the grounds that the amount to be withheld is incorrect or that withholding is not proper because of mis-

> takes of fact, he or she must, within fourteen days of the date of the notice, inform the children's advocate in writing of the reasons why the proposed withholding is contested;
>
> That a mistake of fact exists only when there is an error in the amount of current or overdue support claimed in the notice, there is a mistake as to the identity of the obligor, or the amount of the proposed withholding exceeds the amount permitted to be withheld under applicable federal or state law;

W. Va. Code § 48A-5-3(d)(9) and (10) (1986).

More importantly, the undisputed facts in this case establish that the plaintiff received such a notice. A "Notice to Obligor" was sent to the plaintiff on March 28, 1988, informing the plaintiff that a certain amount of his wages would be withheld and that he could contest the withholding if a "mistake of fact" existed. (App. at 144-49). The notice further

informed the plaintiff that a "mistake of fact" existed if the amounts withheld "exceede(d) the amounts permitted under federal or state law." (App. 145-46). The Fourth Circuit's decision in Reigh is of particular importance to the case at hand. In Reigh, the court upheld the constitutionality of Maryland's post-judgment attachment rules which simply required the debtor to be notified, after attachment, " 'that federal and state exemptions may be available' to him." Reigh, 784 F.2d at 1193 (quoting Maryland post-judgment attachment rules).

To support his argument that he is entitled to a hearing before attachment is commenced, the plaintiff, without any reference to applicable law, attempts to recharacterize the attachment

that occurred in this case as a pre-judgment attachment. (Petition at 32-33). As noted previously, even if this were a pre-judgment case, a pre-attachment hearing would not be constitutionally required. McCahey, 774 F.2d at 550. Contrary to the plaintiff's assertion, however, the attachment that occurred in this case was post-judgment, as it took place after the entry of a final divorce decree by the Kanawha County Circuit Court, awarding both spousal and child support. (App. at 3, 12). The case of Halperin v Austin, 385 F. Supp. 1009 (N.D. Ga. 1974) supports the conclusion that the withholding in this case was post-judgment.

In Halperin, a divorce decree was entered requiring the plaintiff to pay both alimony and child support. Id. at 1010. The plaintiff failed to make the

required payments and, thus, his wife, pursuant to state law, sought to garnish his wages. Id. at 1010-11. Thereafter, the plaintiff filed an action in federal district court claiming that the Georgia garnishment statutes were unconstitutional because they allowed for the deprivation of property without due process of law. Id. at 1011.

In support of his claim, the plaintiff stated that the judgment for alimony used as a predicate for the garnishment action was entirely different from an ordinary judgment. Id. Unlike an ordinary judgment, it was not for a sum certain, and both parties had rights and duties under the decree which may have resulted in the termination of alimony payments. Id. Thus, the plaintiff contended, as does the

plaintiff in this case, that any garnishment which occurred was analogous to a pre-judgment garnishment, and he was therefore entitled to notice and a hearing before garnishment. The district court, however, disagreed:

> The ambulatory nature of a Georgia alimony judgment is a recognition that support is not the duty of a debtor arising in a commercial transaction but, rather, is a continuous obligation providing for the welfare of a former wife and children. Likewise, by the terms of the alimony decree in question, it was adjudicated that Mr. Halpern is liable to make alimony payments in installments. By the nature of the judgment he was notified that the installments may be collected by garnishment unless he takes the initiative of showing that new conditions have arisen justifying a change in terms. This merely reflects the state policy requiring the husband to affirmatively show that a duty created by a valid decree has ended. Any other result, requiring additional notice and hearing before garnishment, will result in shifting the burden to the wife which the original di-

vorce decree places upon the husband.

Id. at 1012. (emphasis added).

The foregoing discussion demonstrates that W. Va. Code § 48A-5-3 is constitutional and that the plaintiff was afforded due process. The Kanawha County Circuit Court entered a divorce decree requiring the plaintiff to pay alimony and child support. (App. at 3, 12). The plaintiff fell in arrears and, therefore, pursuant to W. Va. Code § 48A-3-5, the plaintiff's wages were withheld. Although not constitutionally required, the statute provides an obligor, such as the plaintiff, with notice of the attachment before it occurs and provides the plaintiff with an opportunity to contest the attachment before a DHS officer. W. Va. Code § 48A-5-3(d). The statute also requires the DHS to notify the obligor that federal and state exemptions exist. W. Va. Code § 48A-5-3(d)(10). These dictates were followed in the case at hand. (App. 144-49). Therefore, the plaintiff's claims are without merit, and his Petition must be denied.

**C. JUDITH ROUSH IS NOT A STATE ACTOR. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF HER FROM THE LAWSUIT.**

**1. The question is not presented for review.**

Rule 14 of the Revised Rules of the Supreme Court of the united States sets the standard for questions presented for review. The question is to be "short and concise."

> Statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the Petition, or fairly included therein, will be considered by the Court.

The plaintiff states four questions for this Court's consideration. None of the four questions address directly or indirectly the basis for Mrs. Roush's dismissal from the lawsuit; that is, that she was a private citizen and therefore not subject to suit under § 1983 because she did not act "under color of state law." Nevertheless, despite the fact that no question addressing Mrs. Roush's standing in the lawsuit is posed, the plaintiff launch-

es into an argument regarding Mrs. Roush's conduct beginning on page 44 through page 47, page 52 and pages 56-57. For this reason, Mrs. Roush presents the following argument to preserve her objection.

**2. The complaint asserts no cause of action against Mrs. Roush under 42 U.S.C. § 1983.**

Plaintiff's complaint acknowledges that Mrs. Roush, is the ex-wife of the plaintiff. Plaintiff's Complaint at ¶ 3. (App. 124-26). Plaintiff's complaint also alleges that Judith Roush "together with the Department of Human Services and its employee, Betty Wickline, initiated the wage suggestions complained of herein". (App. 126). These two statements form the sole basis asserted by the plaintiff in his complaint from which the Court is asked to infer that Mrs. Roush acted under

color of state law. The only other claim against Mrs. Roush is set forth in the fifth count of the complaint wherein the plaintiff attempts to allege a West Virginia, common law fraud action. (App. 140-41). The pendant state law claims were dismissed by the District Court when it dismissed the §1983 claims against Mrs. Roush.

The Divorce Order dated January 27, 1988, ordered the plaintiff to provide support for his ex-wife and two children. (App. 3, 12). Prior temporary orders, as essentially admitted to by the plaintiff, were not followed by him in that he admits in his complaint that on February 11, 1987, a recommendation/order was entered "confirming plaintiff was in arrears in his alimony obligations...in the amount of $925.00 [and] granted plaintiff's ex-wife judg-

ment in that amount...." Plaintiff's Complaint, Para. 5A. (App. 128-29). Subsequent to the divorce, the plaintiff became delinquent within thirty days. See, Exhibit 1 to the Complaint indicating a $400.00 arrearage. (App. 144-49). Mrs. Roush sought the assistance of the Child Advocate Office as she had the statutory right to do. Sometime after April 7, 1988, Complaint at Para. 5C, wage withholding commenced. (App. 130-31).

As the complaint indicates, Mrs. Roush's only involvement with the state was to apply for services as an Obligee pursuant to West Virginia Code § 48A-1-1. To suggest that such action makes Mrs. Roush a state actor would mean that every applicant/recipient of food stamps, public health care, or any other federal or statement entitlement,

or of child support collected and distributed by the state's Child Advocate Office, is acting under color of state law.

For a private person to be deemed to be acting under color of state law requires the showing that the individual was "suffused and clothed with the trappings of official 'state action'." Nesglo, Inc. v. Chase Manhattan Bank, N.D., 506 F.Supp. 254, 259 (D.P.R. 1980) (citations deleted); accord, Calvert v. Sharp, 748 F.2d 861, 862 (4th Cir. 1984). No such conduct which could support such a finding is alleged in the complaint and for good reason. Nothing distinguishes Mrs. Roush's request for help from any other mother who needs regular monthly support to feed and clothe herself and her children. Mrs. Roush was neither em-

ployed by the state nor volunteered her services there. The complaint asserts no set of facts by which the Court could infer Mrs. Roush acted under color of state law.

Mrs. Roush is neither a state official nor acted together with a state official or obtained such aid from a joint action with a state official to make her conduct "chargeable to the State." Jackson v. Pantazes, 810 F.2d 426, 428-9 (4th Cir. 1987) citing, Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). Other than completing an application for services as expressly permitted by West Virginia law, Mrs. Roush had no involvement in collection, computation, or distribution of support from the plaintiff's wage withholding, nor is any such involvement alleged by the plaintiff. Use of the procedures

set forth in a post-judgment statute (collection of support following a divorce order) by a private citizen does not "'constitute [] 'joint participation' or 'conspiracy' with state officials satisfying the §1983 requirement of action under color of law.'" Lugar, 457 U.S. at 940, n. 21 (citations deleted).

This Honorable Court in its decision in Lugar set forth the possible tests which may be employed by a Court to determine whether a private citizen's conduct "is fairly attributable to the State." Id. at 937. The two part analysis first focuses on whether the alleged deprivation is caused by the exercise of some right or privilege created by the state or rule of conduct imposed by the state or by a person for whom a state is responsible. Id. Mrs.

Roush conceded for the limited purposes of her Motion to Dismiss that the first part of the test is factually alleged or reasonably inferred from plaintiff's complaint.

The second part of the test requires that "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he is acting together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." Id. It is this part of the analysis which is unsupported by anything alleged in plaintiff's complaint. Mrs. Roush was not the primary beneficiary of the assistance provided by the Child Advocate Office. The Child Advocate Office at the time of the actions com-

plained of represented children. See, e.g., W. Va. Code § 48A-2-2. ("It is the sense of the Legislature that there must a state office, which as its primary function, protects and promotes the best interest of children"). Id. The plaintiff has not chosen to sue his children who were the stated beneficiaries of the actions of the Child Advocate Office. Mrs. Roush sought the assistance of the Child Advocate Office to assist in obtaining the support which the Court in the divorce order had ordered the plaintiff to provide for her and her children. She received no more aid than any of the multitudes of "Obligees" are entitled to under the child support enforcement statutes, state and federal. There are no set of facts alleged which create a reasonable inference that Mrs. Roush was a state

actor or that she should have had some sort of notice that the wage withholding to satisfy the plaintiff's obligation was "illegal and improper" as the plaintiff alleges in his complaint, especially when numerous hearings and court proceedings did not result in such a finding. Indeed, as a close reading of the plaintiff's Statement of Facts in his Petition and his complaint indicate, the plaintiff had any number of hearings and took any number of exceptions to proposed orders so as to give all parties to the proceedings comfort that all due process to which the plaintiff was entitled to occurred. See, e.g., Complaint, Para. 5A (hearing February 11, 1987); Para. 5B (hearing February 16, 1988); Para. 5D (DHS "Responded to plaintiff's repeated written demands and reduced the suggestion by

$150.00 per month to a total of $550.00 per month plus 10%...,); Para. 5E (hearings before Family Law Master Tantlinger and Kanawha Circuit Judge John Hey, July, 1989; Petition at pp. 8-9 (hearing and objections and exceptions to recommendations taken February 16, 1988); and other hearings which are not presently before this Court. (App. 127-33). Further, Mrs. Roush believes this Court should take note of the fact that a hearing is presently scheduled on the alleged overpayments on Petition of the plaintiff which is set to be heard by the Kanawha County, West Virginia Family Law Master at the end of April, 1992.

The test announced in Lugar v. Edmondson was applied by the Fourth Circuit in Jackson v. Pantazes, 810 F.2d 426 (4th Cir. 1987). As the United

States District Court pointed out in its opinion in Roush, the private bail bondsman who was found to have acted under color of state law in Jackson, worked with a police officer to gain access to a private individual's home and jointly harassed the individual. This set of facts met the test for when a private citizen can be deemed to be a state actor. "The facts set forth in Jackson indicates that in the eyes of the plaintiff homeowner there was no way to distinguish the private bondsman from the police officer." Roush v. Roush, 767 F.Supp. 1344, 1353 (S.D. W. Va. 1991). Clearly, such is not the case here. Mrs. Roush sought the assistance of the state agency to receive the support she and her children were entitled to pursuant to the divorce order. The support came, in varying

amounts, through the wage withholding process. Mrs. Roush did not participate in that withholding process. It cannot be enough to make her a "state actor" that she merely invoked appropriate West Virginia procedure. Further, as this Court noted, Lugar is a narrow case limited to the context of prejudgment attachment suits. Lugar, 457 U.S. at 940, n. 21. The plaintiff is complaining about the state's method of obtaining and providing to his children the support he was obligated to pay after the divorce order was entered.

Nor can the plaintiff claim that he had stated a conspiracy under §1983. The assertion of a conspiracy in a §1983 action must be pleaded with specificity. Martin v. Supreme Court of New York, 644 F.Supp. 1537 (N.D.Y.

1986). Mere conclusory allegations are insufficient. Grow v. Fisher, 523 F.2d 875, 878-79 (4th Cir. 1975). Further, The plaintiff's state law claim against Mrs. Roush sounding in fraud states that "conduct upon her part is a fraud both against the DHS and the Courts of the State and against the plaintiff." Complaint, Para. 16. (App. 140-41). The plaintiff cannot have it both ways. His state law fraud claim suggests just the opposite of any conspiracy between Mrs. Roush and the DHS. As this Court noted in Lugar, conduct " 'unlawful under state law...' could not be ascribed to any governmental decision." Id., 457 U.S. at 94D. As a matter of law, the fraud claims in the plaintiff's complaint cannot be part of his alleged § 1983 claims.

Finally, Mrs. Roush pursuant to Rule 14, Revised Rules of the Supreme Court of the United States, objects to the bald assertion of alleged facts not part of this appeal. She objects to the claims on page 45 that she had any knowledge that the plaintiff was paying support for their son into a savings account, particularly in light of plaintiff's admission that he objected and excepted to the Family Law Master's recommendation regarding support for their son. Mrs. Roush also objects to the fact that the plaintiff failed to mention to this Court the binding Order of Judge Canady refusing to release the plaintiff from his obligations to his "absent son." Further, Mrs. Roush objects to the claims on page 45 and 46 to the extent they create an inference that the plaintiff did not appear in

front of the Family Law Master on any number of occasions and did not advise the DHS many times regarding his complaints and receive modifications when appropriate. As the plaintiff admits on page 46 of his Petition, the DHS did change the withholding to reflect the son's reaching maturity. The fact that the Child Advocate Office bureaucracy may have taken a few months to effect the change, does not create an inference that Mrs. Roush used or abused any state procedures.

Wherefore, because the complaint alleges no set of facts which clearly state a conspiracy between Mrs. Roush and the state such as to make her a state actor under §1983, nor allege conduct by her attributable to the state, which might make her amenable to suit under § 1983, the decision of the

United States District Court for the Southern District of West Virginia to dismiss Mrs. Roush, which decision was affirmed by the Fourth Circuit, was in all respects proper. In addition, because the plaintiff failed to follow this Court's Rule 4, Revised Rules of the Supreme Court of the United States, as to Mrs. Roush and include the issue of whether the plaintiff stated a claim against Mrs. Roush in his § 1983 lawsuit, the Court should and need not review the issue at all.

D. UNDER APPLICABLE STATE LAW RP WAS REQUIRED TO HONOR THE ORDERS DIRECTING THAT MR. ROUSH'S WAGES BE WITHHELD AND WOULD HAVE BEEN LIABLE FOR ANY AMOUNTS NOT WITHHELD. THE DISTRICT COURT PROPERLY RULED THAT MR. ROUSH FAILED TO STATE A CLAIM AGAINST HIS EMPLOYER UPON WHICH RELIEF COULD BE GRANTED AND THE COURT OF APPEALS CORRECTLY AFFIRMED THAT DISMISSAL.

The plaintiff's petition (just as his pleadings before) is devoid of any assertion relating to RP which raises any issue under the Constitution of the United States or any federal law. Indeed, the claims purported to be made against RP were entirely creatures of the law of the State of West Virginia.

The District Court's granting of RP's Motion to Dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure was solely based upon that Court's application of the law of the forum state. Furthermore, the petition does not, and could not, raise any issue of the constitutionality of the district court's granting of the Motion to Dismiss. Consequently, the petition raises no issue relating to RP which ought to be considered by this Court and at least as to RP (if not its en-

tirety) the petition should be refused.

The sole involvement of RP in this matter is as an employer of the plaintiff which received and obeyed wage withholding orders issued by the DHS. RP is "caught in the middle" of the fallout from an apparently bitter domestic dispute. RP was not involved in any of the proceedings leading to the issuance of the withholding orders. It is solely a "source of income" subject to garnishment under West Virginia law and upon receipt of lawful orders from a state agency, it obeyed them. RP had no duty or legal right to challenge such orders. It was obligated by law to obey and it did. The District Court's Order dismissing RP from this case was required by State law, and the plaintiff has not identified any interpretation of State law which would

indicate that the District Court's opinion was improper, or that the Fourth Circuit's affirmance of the same was wrong.

Chapter 48A, Article 2 of the West Virginia Code establishes the West Virginia Child Advocate Office "shall pursue the enforcement of support orders through the withholding from income of amounts payable as support ...." W. Va. Code § 48A-3-3(f). In addition, Article 5 of the Enforcement of Family Obligations Act provides that "the withholding from an obligor's income of amounts payable as spousal or child support shall be enforced by the children's advocate in accordance with the provisions of this section." W. Va. Code § 48A-5-3(a).

As a part of the Child Advocate Office's enforcement powers, W. Va. Code § 48A-5-3(f) provides as follows:

> The **source of income of any obligor who is subject to withholding, upon being given notice of withholding, shall withhold from such obligor's income the amount specified by the notice** and pay such amount to the child advocate office for distribution in accordance with the provisions of section four, article three of this chapter. The notice given to the source of income shall contain only such information as may be necessary for the source of income to comply with the withholding order. Id. (emphasis added).

The source of income is **required** by law to send the specified amount to the Child Advocate Office within ten (10) days of the date the obligor (employee) is paid. W. Va. Code § 48A-5-3(h). The required withholding must take place no later than the first pay period or first date of payment of income

which occurs within fourteen (14) days following receipt of the notice of withholding. In addition, "withholding of amounts payable as support ... is **binding on the source of income** until further notice by the child advocate office." W. Va. Code §§ 48A-5-3(k), (j).

In order to determine the amounts which may be withheld from any obligor's income, **the Child Advocate Office of the Department of Human Services** (not RP) must, among other requirements, "ascertain the status of the payment record of the obligor" [West Virginia Code § 48A-5-3(e)(1)]; review and interpret the terms of a support order or master's recommended order entered by the Circuit Court [West Virginia Code § 48A-5-3(d)]; examine the obligor's "payment record

... to determine whether any arrearages are due for amounts which should have been paid prior to a 12-week period which ends with the work week for which withholding is sought to be enforced" [West Virginia Code § 48A-5-3(e)(1)]; determine whether or not the obligor is supporting another spouse or dependent child other than the spouse or child for whom the proposed withholding is being sought [West Virginia Code § 48A-5-3(e)(2), (3)]; and consider whether the obligor has purposefully acted to minimize his or her income [West Virginia Code § 48A-5-3(e)(6)]. By statute, these and other necessary determinations are to be made by the DHS' Child Advocate Office, and no other entity is charged with the responsibility or given the right to perform this analysis.

Moreover, the plaintiff's assertions with respect to an undefined measure which he identifies as "net weekly wages" is absolutely irrelevant to these determinations. In this regard, the definition of "earnings" and "disposable earnings" are not confined to income received from any one employer of an obligor. West Virginia Code § 48A-1-3(a)(9). In fact, the percentage limitations on amounts which may be withheld under the Act do not apply to the wages the plaintiff receives from RP; they apply to the his total disposable earnings. RP would have no knowledge of this figure, and the plaintiff does not allege otherwise. Indeed, RP had no ability, obligation or right to inquire into plaintiff's income sources or to seek information relative to his financial obligations.

As an additional enforcement power, W. Va. Code § 48A-5-3(n) provides that:

> A source of income is liable to an obligee, including the State of West Virginia and the [DHS] where appropriate, for any amount which the source of income fails to withhold from income due an obligor following receipt by such source of income of proper notice under subsection (f) of this section .... Id. (emphasis added)

Thus, the West Virginia Legislature clearly intended that any dispute as to the amount of income properly withheld is to be brought to the attention of the DHS, a Family Law Master, or, if necessary, a Circuit Court. See W. Va. Code §§ 48A-3-6; 48A-4-1(i); 48A-4-6; 48A-4-7. A source of income is under a mandatory obligation to comply with a notice requiring income withholding, and has no opportunity to object to the method by which the amount is calculated or the procedures used in issuing

such a notice. The plaintiff's suggestion that RP should have simply disobeyed these orders is outrageous. His claim that having obeyed the orders, RP is liable to him for damages is unbelievable.

As a final example of the futility of his argument, the plaintiff's admission that he has pursued administrative remedies available under the Act "for several years now" also demonstrates the total absence of any basis for asserting a claim against RP. Even assuming the repayment procedures contained in the regulations are inadequate, RP bears absolutely no responsibility whatsoever for this deficiency. Indeed, but for the fortuitous circumstance that RP happened to be the plaintiff's employer when he opted to stop pursuing these repayment proced-

ures, another entity which serves or has served as a source of income for him could have just as easily been subject to a meritless suit based on the theories of the plaintiff's Complaint against RP. Clearly, his mere dissatisfaction with the Act as written does not suffice to support a claim against RP, or any other source of income, which had nothing whatsoever to do with its enactment.

The plaintiff does not allege that RP has taken any action at variance with the requirements of W. Va. Code § 48A-1-1, et seq. Further, he does not allege that RP has done anything other than obey notices issued pursuant to the Act and served upon RP by DHS. Thus, there is no dispute about the fact that RP had no connec-

tion whatsoever with the initiation of the suggestion procedures against him.

While he repeats various W. Va. Code provisions in his petition before this Court and discusses the alleged impropriety of the procedures followed thereunder in his case, it is clear that RP, the employer, was not a party to those proceedings, was provided no notice of the same, and had absolutely no right to participate in them. Indeed, under the statute, RP was a party against whom the suggestion procedure was applied and had no right to object to the validity of any notice of withholding.

Brief consideration of those decisions cited by the plaintiff shows that they involved factual circumstances clearly divergent from those present in this case. Lynch v. House-

hold Finance Corp., 405 U.S. 538, 31 L. Ed.2d 424 (1983) was a case dealing with the pre-judicial garnishment of plaintiff's savings account for an alleged nonpayment of a promissory note, in which plaintiff sued for declaratory and injunctive relief asking that the statute be declared unconstitutional. Coltharp v. Cutler, 419 F. Supp. 924 (D.C. Utah 1976) involved allegations of abuse of process followed by an alleged use of an unconstitutional garnishment statute. In Coltharp, plaintiff's claim brought under 42 U.S.C. § 1983 was dismissed.

In McMeans v. Schwartz, 330 F. Supp. 1397 (D. C. Ala. 1971), the defendant filed suit against plaintiff and then utilized the state's pre-judgment garnishment statute against him. The defendant in McMeans is in the position

of petitioner's ex-wife in the present case; RP is in the position of the plaintiff's employer in the McMeans case. The employer was not named as a defendant in McMeans. The defendant in McMeans prosecuted an action under a statute which required him to file an affidavit as to the amount of debt owed by plaintiff, and certifying that garnishment was necessary. As in the present action, the employer in McMeans did nothing more than properly obey legal process served on it.

Moreover, those cases cited by the plaintiff for the proposition that a private individual can be held liable for participating in a conspiracy with state officials to deprive a person of constitutional rights are completely inapposite to the case at bar. McNally v. Pulitzer Pub. Co., 532 F.2d 69 (8th

Cir. 1970) involved a suit by a prison inmate against prison officials and a newspaper reporter for publishing parts of a report evaluating plaintiff's psychiatric condition. Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975) involved a suit against a state prosecutor, the charging parties, and prosecution witnesses for allegedly trying patently false claims against the plaintiff.

Contrary to his argument, Grow appears to stand for the exact opposite proposition from that which is cited by the plaintiff. Specifically, the Court in Grow dealt with a complaint, identical in this regard to the Complaint filed by Mr. Roush herein, which alleged only that private individuals acted "in concert" with state officials. In evaluating this allega-



tion upon a motion to dismiss for fail-

ure to state a claim against the individual defendants, the Court held that this charge was not sufficiently specific to support a claim of conspiracy under 42 U.S.C. § 1983. Grow at 878-879. See also Martin v. Supreme Court of State of N.Y., 644 F. Supp. 1537 (N.D. N.Y. 1986) ("Assertion of a conspiracy in a § 1983 action must be pleaded with specificity," and where "there is nothing more in the Complaint than the allegation that [the defendant] employed the statutorily-provided mechanisms for registration of, and execution on, a judgment" this is insufficient.) The plaintiff's Complaint herein contains nothing but vague, nonspecific, insufficient and conclusory allegations. It cannot withstand scrutiny. "Acting in concert" means far more than obeying lawful orders re-

ceived. RP has no liability to the plaintiff for this aspect of his claim. The Court of Appeals properly affirmed RP's dismissal from this case and the plaintiff has failed to present any valid basis, much less a compelling need, for this Court to accept his Petition with respect to the disposition of his claims against his employer.

## CONCLUSION

For the foregoing reasons, the plaintiff's petition should be denied.

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